No. 15-674

In the

Supreme Court of the United States

THE UNITED STATES OF AMERICA, *et. al.*,
Petitioners,

v.

THE STATE OF TEXAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CRISTEN WOHLGEMUTH
Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

The Executive Branch has unilaterally created a program, Deferred Action for Parental Accountability ("DAPA"), that will confer "lawful presence," as well as eligibility for myriad benefits, on millions of aliens who are unlawfully present in the United States. The program exceeds merely prioritizing aliens for removal, and so presents the following questions, encompassed within this Court's question whether the President's actions violate the Take Care Clause:

1) Has the Executive exceeded its prosecutorial discretion by categorically granting "lawful presence" and numerous other benefits to aliens unlawfully present in the United States?

2) Has the Executive exercised power in violation of the non-delegation doctrine, and the limits placed on the Executive through Article I of the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Suspension of Removal under the DACA and DAPA Programs Cannot Be Sustained As an Exercise of Prosecutorial Discretion. 3

A. The Immigration and Nationality Act Mandates Removal of Unauthorized Aliens. ... 3

B. DACA and DAPA are Categorical, and Therefore Unconstitutional, Suspensions of the Law. 7

II. Prosecutorial Discretion Does Not Extend to the Granting of "Lawful Presence" or of Benefits. 14

III. The Administation's Interpretation of Section 1324a(h)(3) Runs Afoul of the Non-Delegation Doctrine. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136, 141 (1967) 2

Adams v. Richardson,
480 F.2d 1159 (1973) (en banc) 8

Blodgett v. Holden,
275 U.S. 142 (1927) (opinion of Holmes, J.) 21

Chamber of Commerce of U.S. v. Whiting,
131 S. Ct. 1968 (2011) 18

Clinton v. New York,
524 U.S. 417, 438 (1998) 22

Crane v. Napolitano, 3:12-CV-03247-O,
2013 WL 1744422 (N.D. Tex. Apr. 23, 2013) 6, 7

Crowley Caribbean Transp., Inc. v. Pena,
37 F.3d 671 (D.C. Cir. 1994) 11

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 6

Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.,
289 U.S. 266 (1933) 20

Fiallo v. Bell,
430 U.S. 787 (1977) 21

FTC v. Gratz,
253 U.S. 421 (1920) 20

Galvin v. Press,
347 U.S. 522 (1954) 21

Heckler v. Chaney,
470 U.S. 821 (1985) ..... passim

Hoffman Plastic Compounds, Inc. v. N.L.R.B.,
535 U.S. 137 (2002).....18

In re E-R-M & L-R-M,
25 I. & N. Dec. 520, 520 (BIA 2011).....7

INS v. Chadha,
462 U.S. 919 (1983).....21

J.W. Hampton, Jr., & Co. v. United States,
276 U.S. 394 (1928).....20

Kendall v. United States ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838).....3, 11

Kleindienst v. Mandel,
408 U.S. 753 (1972).....21

Lopez v. Davis,
531 U.S. 230 (2001).....6

Lozano v. City of Hazleton,
496 F. Supp. 2d 477 (M.D. Pa. 2007) 18

Mistretta v. U.S.,
488 U.S. 361 (1989).....20

New York Central Securities Corp. v. United States,
287 U.S. 12 (1932).....20

Oceanic Steam Navigation Co. v. Stranahan,
214 U.S. 320 (1909).....21

Perales v. Casillas,
903 F.2d 1043 (5th Cir. 1990).....12

Perez v. Mortgage Bankers Ass'n,
135 S.Ct. 1199 (2015).....1

Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999).....13

Sale v. Haitian Centers Council, Inc.,
509 U.S. 155 (1993).....21

Tagg Bros. & Moorhead v. United States,
280 U.S. 420 (1930).....20

Texas v. United States,
809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015).....19

Town of Castle Rock, Colo. v. Gonzales,
545 U.S. 748 (2005).....5

U.S. Dep't of Trans. v. Ass'n of American Railroads,
135 S.Ct. 1225 (2015).....1

U.S. v. Juarez-Escobar,
25 F. Supp. 3d 774 (W.D. Pa. 2014).....12

Util. Air Regulatory Grp. v. E.P.A.,
134 S.Ct. 2427 (2014).....1

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001).....19

Statutes

5 U.S.C. § 701(a)(2).....7

8 U.S.C. § 1101(a)(15).....16, 17

8 U.S.C. § 1154(a)(1)(D)(i)(II).....13

8 U.S.C. § 1158(c)(1)(B).....17

8 U.S.C. § 1182(a)(6)(C).....4

8 U.S.C. § 1182(a)(6)(E)(iii).....13

8 U.S.C. § 1182(a)(7).....4

8 U.S.C. § 1182(d)(13).....14

8 U.S.C. § 1182(d)(14) 14
8 U.S.C. § 1225(a)(2) 4
8 U.S.C. § 1225(a)(3) 3
8 U.S.C. § 1225(b)(1)(A)(i) 4
8 U.S.C. § 1225(b)(2)(A) 4
8 U.S.C. § 1226(a)(3) 17
8 U.S.C. § 1229a 4, 5
8 U.S.C. § 1229a(b)(5)(A) 4
8 U.S.C. § 1229a(c)(1)(A) 5
8 U.S.C. § 1229a(c)(2) 5
8 U.S.C. § 1229a(c)(3) 5
8 U.S.C. § 1229b 14
8 U.S.C. § 1229c 13
8 U.S.C. § 1231(a)(7) 17
8 U.S.C. § 1252(b) 12
8 U.S.C. § 1254a 13
8 U.S.C. § 1255(b)(2)(A) 6
8 U.S.C. § 1324a(a)(1) 16
8 U.S.C. § 1324a(h)(3) ..... passim
29 U.S.C. § 626(d) 6
National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694 13
Title VI of the Civil Rights Act of 1964 8
USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 13

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 7. 22

U.S. Const. Art. II, § 3.....3, 10

Other Authorities

1 ABA Standards for Criminal Justice (2d ed.1980)..5

Bo Cooper, General Counsel, INS, *INS Exercise of Prosecutorial Discretion* (July 11, 2000) 15

Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, p. 1 (June 15, 2012).....8, 9

Jeh Charles Johnson, Memorandum for Leon Rodriguez, *et al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, p. 2 (Nov. 20, 2014).....10, 14, 16

Karl R. Thompson, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, p. 7 (Nov. 19, 2014) 11, 13

R. Rotunda and J. Nowak, 1 Treatise on Const. Law (March 2016).....5

Transcript, Hearing on *President Obama's Executive Overreach on Immigration*, House of

Representatives Judiciary Committee (Dec. 2, 2014) 10

U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (June 15, 2015) 15

Rules

Sup. Ct. R. 37.32(a) 1

Sup. Ct. R. 37.6 1

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, derived from Montesquieu and embedded in the very structure of the Constitution, that the powers of government must be divided into separate branches in order to avoid abuse. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing core separation of powers issues such as those presented by this case, including *U.S. Dep't of Trans. v. Ass'n of American Railroads*, 135 S.Ct. 1225 (2015); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015); and *Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427 (2014).

SUMMARY OF ARGUMENT

This Court has long recognized that prosecutorial discretion must be consistent with Congress's duly enacted statutory scheme. In *Heckler v. Chaney*, for example, this Court noted that the normal presumption against judicial review of executive branch decisions

---

[1] Pursuant to this Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

not to enforce a statute "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." 470 U.S. 821, 833 (1985). Absent "clear and convincing" congressional intent to the contrary, *id.*, at 830 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)), agency enforcement actions related to immigration must follow the statutory scheme established within the Immigration and Nationality Act ("INA"). Since the language of the INA very clearly directs that immigration officials "shall" deport aliens who are unlawfully present in the United States, there is arguably no prosecutorial discretion at all, much less the expansive claim of prosecutorial discretion that the Executive Branch has offered here with the DAPA program (and its predecessor, the Deferred Action for Childhood Arrivals ("DACA") program).

But even assuming that prosecutorial discretion is broad enough to validate the wholesale, categorical suspension of the law that is at issue here, prosecutorial discretion simply cannot be extended to confer "lawful presence" on those who are unlawfully present in the United States, or to render eligible for work authorization and a litany of other benefits those who are ineligible for them as a matter of law.

The Government's claim to the contrary is based on an impermissible interpretation of 8 U.S.C. § 1324a(h)(3). In its view, that provision grants the Secretary unfettered power to grant work authorization to any unauthorized aliens against whom it has refused to enforce the immigration laws. Such an interpretation stands in direct conflict with the Non-Delegation Doctrine, even in the moribund state in which that doctrine currently exists. Congress has not

provided DHS with any intelligible principle upon which it must rely in its enforcement capacity, nor has the United States articulated any such principle in its attempts to justify its conduct.

Both DACA and DAPA therefore represent an abdication of the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. By the President's command (or, more precisely, by the command of the President's Secretary of Homeland Security), the executive agencies charged with enforcing the immigration laws have not only failed in their statutory duty, but they have been affirmatively prohibited from executing that duty by the Secretary. This Court in *Kendall v. United States ex rel. Stokes* specifically rejected the contention that the President's obligation "to see that the laws be faithfully executed, implies a power to forbid their execution." 37 U.S. (12 Pet.) 524, 613 (1838). We agree with *Kendall*, and we strongly urge this Court to uphold the decision of the Fifth Circuit in this matter.

ARGUMENT

I. The Suspension of Removal under the DACA and DAPA Programs Cannot Be Sustained As an Exercise of Prosecutorial Discretion.

A. The Immigration and Nationality Act Mandates Removal of Unauthorized Aliens.

Several provisions of the Immigration and Nationality Act *mandate* specific enforcement actions by immigration officials. § Section 1225(a)(3), for example,

specifies that "All aliens (including alien crewmen) who are applicants for admission [defined as any alien who has not been admitted] or otherwise seeking admission or readmission to or transit through the United States *shall be inspected by immigration officers*." 8 U.S.C. § 1225(a)(3) (emphasis added).[2] Absent a credible claim for asylum, stowaways are not eligible for admission at all, and "*shall be ordered removed* upon inspection by an immigration officer." § 1225(a)(2) (emphasis added). And apart from a few exceptions not at issue here, once an immigration officer "determines that an alien ... is inadmissible under section 1182(a)(6)(C) or § 1182(a)(7) of this title, the officer *shall order the alien removed* from the United States without further hearing or review ...." § 1225(b)(1)(A)(i). In other cases, "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a [removal] proceeding under section 1229a ...." § 1225(b)(2)(A).

Once an alien has been detained under that statutory mandate, "[a]n immigration judge *shall conduct proceedings* for deciding the inadmissibility or deportability of an alien. § 1229a(a)(1) (emphasis added). An alien who fails to appear "*shall be ordered removed* in absentia" if the Immigration Service establishes that the alien was provided written notice of the hearing and that the alien is removable. § 1229a(b)(5)(A) (emphasis added). Finally, applying the burdens of proof set out in the statute, "[a]t the conclusion of the proceeding the immigration judge *shall decide* whether

---

[2] All code section references are to Title 8 of the U.S. Code, unless otherwise noted.

an alien is removable from the United States." § 1229a(c)(1)(A) (emphasis added); §§ 1229a(c)(2), (3).

In other words, the statutory scheme uses the mandatory "shall" rather than a discretionary "may" throughout, indicating Congress's intent to treat these duties as ministerial mandates rather than discretionary enforcement options.

To be sure, this Court has recognized that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 760 (2005) (citing 1 ABA Standards for Criminal Justice 1–4.5, commentary, pp. 1–124 to 1–125 (2d ed.1980). But removal proceedings are civil proceedings, not criminal ones, and as at least one prominent legal treatise has noted: "In contrast to criminal prosecution, the government has no free rein to refuse to enforce civil actions." R. Rotunda and J. Nowak, 1 Treatise on Const. Law § 7.6 (March 2016).

Moreover, Congress's statutory scheme here provides the "stronger indication" of a true mandate that this Court found lacking in *Gonzales*. 545 U.S. at 761 62. Beyond the repeated use of the mandatory language, Congress specified that removal proceedings "*shall be the sole and exclusive procedure* for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." § 1229a(a)(3) (emphasis added). The President's claim here that he has discretion *not to commence removal proceedings* against unauthorized aliens and thereby afford to them a "lawful presence" in the United States cannot be squared with Congress's language that a determination of admissi-

bility by an immigration judge in a removal proceeding is the "sole and exclusive" means for determining whether an alien may be admitted.

The U.S. District Court for the Northern District of Texas in *Crane v. Napolitano*, 3:12-CV-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013), recently came to the same conclusion. Although that action by border patrol agents was ultimately dismissed for lack of subject matter jurisdiction because the Merit Systems Protection Board was the exclusive venue for their claims,[3] the District Court's analysis of the relevant statutory language was thorough, and persuasive: "Congress's use of the word 'shall' in Section 1255(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not 'clearly and beyond a doubt entitled to be admitted.'" *Id.* at *17.

The court found compelling this Court's decisions in *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008), and *Lopez v. Davis*, 531 U.S. 230 (2001). *Holowecki* held that the EEOC's "duty to initiate informal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context" because of statutory language in 29 U.S.C. § 626(d) providing that the EEOC "*shall* promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 552 U.S. at 399 (emphasis added). Similarly, *Lopez* noted that Congress's "use of a mandatory 'shall' . . . impose[s] discretionless obligations." 531 U.S. at 241. The court

---

[3] *Crane*, No. 3:12-cv-03247-O, Order (N.D. Tex., July 31, 2013), available at http://www.crs.gov/analysis/legalsidebar/Documents/Crane_DenialofMotionforReconsideration.pdf.

also found this Court's decisions in, *e.g.*, *Heckler v. Chaney*, 470 U.S. at 835, and *In re E-R-M & L-R-M*, 25 I. & N. Dec. 520, 520 (BIA 2011), to be distinguishable. The discretion recognized in the latter—an immigration case—was simply whether to refer an unauthorized alien to regular or expedited removal proceedings, the court noted, not "to refrain from initiating removal proceedings at all." *Crane*, 2013 WL 1744422, at *10. And the court found the statutory language in the Food, Drug, and Cosmetic Act at issue in *Chaney*, which this Court held committed "complete discretion to the Secretary to decide how and when they should be exercised," 470 U.S. at 835, to be in contrast with the Immigration and Nationalization Act, which "is not structured in such a way that DHS and ICE have complete discretion to decide when to initiate removal proceedings." *Crane*, 2013 WL 1744422, at *10.

B. DACA and DAPA are Categorical, and Therefore Unconstitutional, Suspensions of the Law.

Even if Congress's use of the mandatory term "shall" is deemed not to foreclose prosecutorial discretion in individual cases, the President's DACA and DAPA programs go much further than authorizing case by case discretion. Instead, they amount to a categorical and therefore unconstitutional suspension of the law.

This Court's decision in *Chaney* is instructive. After concluding "that an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)" of the Administrative Procedures Act, this Court "emphasize[d] that the

decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney*, 470 U.S. at 832-33. This Court then cited, with apparent approval, the D.C. Circuit's en banc decision in *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc). The Court of Appeals in that case rejected the Government's claim of discretion over how or even whether to enforce Title VI of the Civil Rights Act of 1964. "Title VI not only require[d] the agency to enforce the Act, but also set[] forth specific enforcement procedures," *Id.* at 1162, just as the Immigration and Naturalization Act does here. More significantly, the Court of Appeals recognized—in language cited by this Court—that prosecutorial discretion does not apply when an agency "has consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty." *Id.*; *see also Chaney*, 470 U.S. at 833 n.4.

Both the DACA and the DAPA program fall on the "categorical suspension of the law" side of the *Chaney* line. In her June 15, 2012 memo establishing the DACA program (the precursor to the DAPA program under review in this case), former Homeland Security Secretary Janet Napolitano set out specific, categorical criteria for DACA program eligibility. Memo from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, p. 1 (June 15, 2012). Although the memo repeatedly asserts that eligibility decisions are to be made "on a case by case basis," it is actually a directive to immigration officials

to grant deferred action to anyone meeting the criteria. "With respect to individuals who meet the above criteria" and are not yet in removal proceedings, the memo orders that "ICE and CBP *should* immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States." *Id.* at 2 (emphasis added). And "[w]ith respect to individuals who are in removal proceedings but not yet subject to a final order of removal, and who meet the above criteria," "ICE *should* exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States." *Id.* (emphasis added). USCIS and ICE are directed to "establish a clear and efficient process" for implementing the directive, and that process "*shall* also be available to individuals subject to a final order of removal regardless of their age." *Id.* (emphasis added).

Current Homeland Security Secretary Jeh Johnson's November 2014 memo establishing the DAPA program does the same thing. Although sprinkled with the phrase, "case-by-case basis," it also establishes eligibility criteria for the new program and directs immigration officials "to immediately begin identifying persons" who meet the eligibility criteria, in order "to prevent the further expenditure of enforcement resources with regard to these individuals." Jeh Charles Johnson, Memorandum for Leon Rodriguez, *et al.*, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent*

Residents, p. 2 (Nov. 20, 2014). The memo even announces that the process for terminating removal of eligible aliens "*shall also be available* to individuals" already "subject to final orders of removal." *Id.* (emphasis added).

The notion that either memo allows for a true individualized determination rather than providing a categorical suspension of the law is simply not credible. There is nothing in the memos to suggest that immigration officials can do anything other than grant deferred action to those meeting the defined eligibility criteria. Indeed, the overpowering tone of the memos is one of woe to line immigration officers who do not act as the memo tells them they "should," a point that was been admitted by Department of Homeland Security officials in testimony before the House of Representatives. *See* Transcript, Hearing on *President Obama's Executive Overreach on Immigration*, House of Representatives Judiciary Committee (Dec. 2, 2014) (Represenative Goodblatt noting: "DHS has admitted to the Judiciary Committee that, if an alien applies and meets the DACA eligibility criteria, they will receive deferred action. In reality, immigration officials do not have discretion to deny DACA applications if applicants fulfill the criteria.").

Nevertheless, by repeatedly regurgitating the phrase, "on a case by case basis," Secretaries Napolitano and Johnson seem to recognize that prosecutorial discretion cannot be exercised categorically without crossing the line drawn in *Chaney* into unconstitutional suspension of the law—without, that is, violating the President's constitutional obligation to "take care that the laws be faithfully executed." U.S. Const. Art. II, § 3; *Chaney*, 470 U.S. at 833 n.4. But the

memos' directives to the immigration services *not to enforce* the immigration laws against anyone meeting the eligibility criteria set out in the memos, "in order to prevent low priority individuals from being removed from the United States," clearly falls on the unconstitutional side of the *Chaney* line. As this Court recognized nearly 180 years ago, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall*, 37 U.S. at 613.

The Office of Legal Counsel at the Department of Justice likewise has recognized the need for individualized determinations for exercises of prosecutorial discretion to be constitutional. "[T]he Executive Branch ordinarily cannot ... consciously and expressly adopt[] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities," the memo notes. Karl R. Thompson, Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, p. 7 (Nov. 19, 2014) (quoting *Chaney*, 470 U.S. at 833 n.4, internal quotation marks omitted). "[A] general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion." *Id.* (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994)). Yet that is exactly what the administration has done here. As the district court for the Eastern District of Pennsylvania correctly recognized, the executive action at issue here, establishing threshold eligibility criteria for aliens unlawfully present in the United States to obtain "deferred action"

constitutes "legislation" rather than prosecutorial discretion, "and effectively changes the United States' immigration policy." *U.S. v. Juarez-Escobar*, 25 F. Supp. 3d 774, 786 (W.D. Pa. 2014).

Neither are the Administration's actions—either the adoption of the DACA program in June 2012 or the DAPA program's massive expansion of it announced in November 2014—simply an exercise of the kind of prosecutorial discretion that has been exercised by previous administrations. Much has been made of the Family Fairness Program implemented by President George H.W. Bush's administration in February, 1990. But that program, which dealt with delayed voluntary departure rather than the current program's deferred action, was specifically authorized by statute. Section 242(b) of the Immigration and National Act at the time provided, in pertinent part:

> *In the discretion of the Attorney General* and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraphs (4) to (7), (11), (12), (14) to (17), (18), or (19) of section 1251(a) of this title.

8 U.S.C. § 1252(b), *cited in Perales v. Casillas*, 903 F.2d 1043, 1048 (5th Cir. 1990) (emphasis added).

That specific statutory authority was largely superseded by the Temporary Protected Status program established by the Immigration Act of 1990, which is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions, 8 U.S.C. § 1254a, and subsequently limited to 120 days by the 1996 Illegal Immigration Reform and Immigrant Responsbility Act ("IIRIRI"), *see* 8 U.S.C. § 1229c. In contrast, as even the OLC opinion acknowledges, "deferred action," which is the asserted basis for the President's recent actions, "developed without statutory authorization." OLC Memo, at 13; *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (noting that deferred action "developed without express statutory authorization," apparently in the exercise of discretionary response to international humanitarian crises that trigger the President's separate foreign affairs authority of the sort now covered by the Temporary Protected Status Program).

There are now specific statutes that authorize deferred action. *See, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"); USA PATRIOT ACT of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (proving that certain immediate family members of Lawful Permanent Residents who were killed on 9/11 should be made "eligible for deferred action."); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694, and other statutes that delegate to the Attorney General discretion to waive other provisions of the INA in specific circumstances, *see, e.g.*, 8 U.S.C. § 1182(a)(6)(E)(iii), (d)(11) (authorizing discretionary waiver of smuggler ineligibility for admission rule for

smugglers who only assisted their own spouses, parents, or children); 8 U.S.C. § 1182(d)(13), (14) (authorizing, in certain specified circumstances, discretionary waiver of inadmissibility rules for recipients of "T" and "U" visas); *cf.* 8 U.S.C. § 1229b (authorizing the Attorney General to "cancel removal" and "adjust status" for up to four thousand aliens annually who are admitted for lawful permanent residence and who meet certain specific statutory criteria). But none of these statutes authorize the broad use of deferred action for domestic purposes asserted by the June 2012 DACA program or the expanded November 2014 DAPA program. Indeed, the fact that Congress deemed it necessary to include such statutory authorization for these specific domestic uses of deferred action is compelling evidence that the Executive does not have unfettered discretion to give out deferred action whenever it chooses, and certainly not to deem such individuals as "lawfully present in the country for a period of time," as Secretary Johnson claimed in his November 20, 2014 memo. Johnson Memo, *supra*, at 2.

II. Prosecutorial Discretion Does Not Extend to the Granting of "Lawful Presence" or of Benefits.

Even if the President's categorical suspension of deportation requirements could be viewed as a valid exercise of prosecutorial discretion, the granting of affirmative benefits such as work authorization and "lawful presence" cannot be.

"The doctrine of prosecutorial discretion applies to enforcement decisions, not benefit decisions," noted Bo Cooper, General Counsel for the Immigration and

Naturalization Service at the end of the Clinton Administration. Bo Cooper, General Counsel, INS, *INS Exercise of Prosecutorial Discretion*, at 4 (July 11, 2000).[4] Although Cooper was of the opinion that the INS had "prosecutorial discretion to place a removable alien in proceedings, or not to do so," he acknowledged that it did "not have prosecutorial discretion to admit an alien into the United States who is inadmissible under the immigration laws, or to provide any immigration benefit to any alien ineligible to receive it." *Id.* at 1. "[T]he grant of an immigration benefit, such as naturalization or adjustment of status, is a benefit decision that is not a subject for prosecutorial discretion." *Id.* at 4.

Yet the Immigration services contend that an unauthorized alien "who has received deferred action is authorized by DHS to be present in the United States, and is therefore considered by DHS to be lawfully present during the period of deferred action is in effect." U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (June 15, 2015).[5] And Secretaries Napolitano and Johnson both directed the immigration services to extend work authorization to individuals they placed in deferred action who were otherwise ineligible to work in the United States. Secretary Napolitano's memo establishing the DACA program cited no provision of law authorizing her to

---

[4] Available at http://niwaplibrary.wcl.american.edu/reference/dditional-materials/immigration/enforcement-detention-and-criminaljustice/government-documents/Bo-Cooper-memo%20pros%20discretion7.11.2000.pdf

[5] Available at https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

grant work authorization, but Secretary Johnson purported to find such authority in five words of the work authorization definitional statute. "Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of the Immigration and Nationality Act," he wrote. Johnson Memo, at 4-5 (citing 8 U.S.C. § 1324a(h)(3)).

Section 1324a establishes the general rule that employing an unauthorized alien is illegal. Subsection (a)(1) specifically makes it unlawful to hire "an unauthorized alien (as defined in subsection (h)(3) of this section)." Subsection (h)(3) in turn defines "unauthorized alien" as any alien who is not "lawfully admitted for permanent residence" (that is, someone who qualifies under one of the carefully wrought exemptions to inadmissibility contained in Section 1101(a)(15) of the Immigration Code, such as the "T" visa) or an alien "authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added).

That last phrase, "or by the Attorney General" (and by extension the Secretary of Homeland Security), is the statutory hook that Secretary Johnson claims provides him unfettered discretion to grant work authorization to any unauthorized alien he wishes. It is, to say the least, a pretty slim reed.

For one thing, such a broad interpretation of that brief statutory reference would render superfluous several other statutory provisions that give specific authority to the Attorney General to confer both lawful status and work authorization and other benefits

on certain unauthorized aliens in carefully circumscribed circumstances. Section 1101(a)(15)(V), for example, allows the Attorney General to confer temporary lawful status on the close family members of lawful permanent residents who have petitioned the Attorney General for a nonimmigrant visa while an application for an immigrant visa is pending. Section 1158(c)(1)(B) authorizes the Secretary to grant work authorization to aliens who have been granted asylum). Section § 1226(a)(3) allows the Secretary to grant work authorization to otherwise work-eligible aliens pending a removal decision, and Section § 1231(a)(7) permits the Secretary to grant work authorization under certain narrow circumstances to aliens who have received final orders of removal. Much more likely, therefore, that the phrase, "or by the Attorney General," simply refers to the specific grants of authority given to the Attorney General in other provisions of the Immigration code.

For another, nothing in the legislative history suggests that Congress intended to give the Attorney General the kind of unfettered discretion the Secretary now claims. The section of the immigration law that includes the brief phrase on which this entire edifice has been erected was added in 1986 as part of the Immigration Reform and Control Act. The legislative record leading to the adoption of that monumental piece of legislation is extensive, but there does not appear to be any discussion whatsoever of the clause, much less any claim that by including that clause, Congress was conferring unfettered discretion on the Attorney General to issue "lawful presence" and work authorization to anyone illegally present in the United States he chose. Indeed, such a position makes

a mockery out of the finely wrought (and hotly contested) provisions elsewhere in the Immigration code providing for such lawful status only upon meeting very strict criteria.

The more limited view of Section 1324a(h)(3), namely, that it simply refers to other provisions of federal law conferring such authority on the Attorney General in specific circumstances, was implicitly espoused by a plurality of this Court when, in *Chamber of Commerce of U.S. v. Whiting*, it summarized Section 1324a(h)(3) as defining an "unauthorized alien" to be "an alien not 'lawfully admitted for permanent residence' or *not otherwise authorized by federal law to be employed*." 131 S. Ct. 1968, 1981 (2011) (emphasis added); *see also Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002) (federal immigration law denies "employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States," citing Section 1324a(h)(3)); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-19 (M.D. Pa. 2007), *aff'd in part, vacated in part*, 620 F.3d 170 (3d Cir. 2010), *judgment vacated sub nom. City of Hazleton, Pa. v. Lozano*, 131 S. Ct. 2958 (2011), and *aff'd in part, rev'd in part*, 724 F.3d 297 (3d Cir. 2013).

Moreover, if the clause does provide the Attorney General (now Homeland Security Secretary) with such unfettered discretion, Congress has been wasting its time trying to put just such an authority into law. For more than a decade illegal immigration advocates have been pushing for Congress to enact the DREAM Act, the acronym for the Development, Relief, and Education for Alien Minors Act first introduced by Senators Dick Durbin and Orin Hatch as

Senate Bill 1291 back in 2001. The bill would give lawful permanent residence status and work authorization to anyone who arrived in this country illegally as a minor, had been in the country illegally for at least five years, was in school or had graduated from high school or served in the military, and was not yet 35 years old (although that age requirement could be waived). The bill or some version of it has been reintroduced in each Congress since, but has usually faced such stiff opposition by those who view its principal provisions as an "amnesty" for illegal immigrants that even its high-level bipartisan support has proved insufficient to get the bill adopted. It is hard to imagine the expenditure of so much political capital to achieve authority that the Secretary claims has been in the existing statutes all along. As Judge Smith noted below, such an interpretation is "exceedingly unlikely." *Texas v. United States*, 809 F.3d 134, 183 (5th Cir. 2015), *as revised* (Nov. 25, 2015). "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.*, n. 186 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

III. The Administration's Interpretation of Section 1324a(h)(3) Runs Afoul of the Non-Delegation Doctrine.

Finally, even if this Court were to accept that the general phrase, "or by the Attorney General," could be interpreted to give the Secretary authority to extend work authorization without reliance on other specific grants of authority, such an interpretation would render the clause unconstitutional, a violation of a core aspect of separation of powers.

Article I, Section I of the Constitution requires that "[a]ll legislative Powers" granted by the Constitution must be exercised by Congress and cannot be delegated away. This Court has held that Congress can delegate a large amount of rule-making authority to executive branch agencies, but only if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989).

To be sure, this Court has, over the decades, been rather generous in determining what qualifies as an "intelligible principle." *See, e.g., Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930) ("just and reasonable"); *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932) ("public interest"); *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) ("public convenience, interest, or necessity"); and *FTC v. Gratz*, 253 U.S. 421 (1920) ("unfair methods of competition"). But even though the treatment of such amorphous language as an "intelligible" principle might rightly cause one to wonder whether the word "intelligible" is really intelligible at all, this Court has always insisted that there at least be *something* in the statute adopted by Congress to constrain the agency's discretion.

Here, if Secretary Johnson's interpretation of Section 1324a(h)(3) were to be accepted, there is absolutely nothing. The phrase, "or by the Attorney General," is not constrained by any requirement that the Attorney General's decision be in the "public interest," or for the "public convenience, interest, or necessity," or be "just and reasonable," or even be in the public

interest *as the Attorney General determines it to be.* Rather, it stands entirely on its own, unadorned and unencumbered by any lawmaking judgment by Congress.

Because such an interpretation as that offered by Secretary Johnson would be manifestly unconstitutional, a violation of the non-delegation doctrine even in its current, largely moribund state, it should only be adopted, under the doctrine of constitutional avoidance, if no other reasonable interpretation exists that would render the statute constitutional. *See, e.g., Blodgett v. Holden,* 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Because here, the constitutionally-valid alternative interpretation set out above is not only reasonable, but much more consistent with the Immigration code in its entirety, Secretary Johnson's interpretation simply cannot stand.

This should be particularly true in the immigration law context, over which Congress's power has repeatedly been described by this Court as "plenary." *See, e.g., Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 201 (1993); *INS v. Chadha,* 462 U.S. 919, 940-41 (1983); *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972). Indeed, this Court declared over a century ago that "over no conceivable subject is the legislative power *of Congress* more complete" than immigration. *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320, 339 (1909) (emphasis added); *Fiallo v. Bell,* 430 U.S. 787, 792 (1977). "[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Galvin v. Press,* 347 U.S. 522, 531 (1954) (emphasis added).

There is yet another constitutional problem with the Secretary's interpretation. The granting of "lawful presence" and work authorization by the Executive branch alone makes DACA and DAPA recipients eligible for other financial benefits without specific authorization from Congress. That violates Article I, Section 9 of the Constitution, which provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Only Congress, in compliance with the bicameralism and presentment requirements of the Constitution, can authorize such appropriations; the President (much less his Secretary of Homeland Security) cannot do it unilaterally. *See Clinton v. New York*, 524 U.S. 417, 438 (1998).

CONCLUSION

For the reasons noted above, the decision of the Fifth Circuit enjoining the implementation of DAPA should be affirmed.

Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CRISTEN WOHLGEMUTH
Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu